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No. .....

# In the Supreme Court of the United States

OCTOBER TERM, 1982

MARINE TERMINALS CORPORATION AND
INA/PACIFIC EMPLOYERS INSURANCE GROUP,
*Petitioners,*

VS.

JOHN F. KELLY,
*Respondent.*

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## QUESTION PRESENTED

Whether an injury sustained by a land based security guard while performing land based patrolling activity for an employer engaged in maritime operations satisfies the status and situs requirements of the Longshoremans' and Harbor Workers' Compensation Act, so as to entitle said employee to Longshore and Harbor Workers' Compensation benefits in addition to state workers' compensation benefits?

## LIST OF PARTIES

Marine Terminals Corporation
INA/Pacific Employers Insurance Group
John F. Kelly
Director, Office of Workers' Compensation Programs
United States Department of Labor

## SUBJECT INDEX


| | Pages |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statutes Involved | 2 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 4 |
| Conclusion | 5 |

# TABLE OF AUTHORITIES CITED


| Cases | Pages |
|---|---|
| Arbeeny v. McRoberts Protective Agency, 642 F.2d 672 (2d Cr. 1981), 13 BRBS 177 | 4 |
| P. C. Pfeiffer Company, Inc. v. Diverson Ford, 44 U.S. 69, 11 BRBS 320 (1979) | 4 |

| Statutes | |
|---|---|
| 28 USC 1254 (4) | 2 |
| 33 USC (Longshoremens' and Harbor Workers' Compensation Act) Section 902(3) | 3, 4 |

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## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners respectfully pray that a Writ of Certiorari be issued to review the opinion and judgement of the United States Court of Appeals for the Ninth Circuit.

### OPINIONS BELOW

The opinion of the Administrative Law Judge is reported at 11 BRBS 11 (ALJ). The opinion of the Benefits Review Board is reported at 13 BRBS 609. The opinion of the Court of Appeals, Order for Publication No. 81-7499, was filed June 3, 1982.

## JURISDICTION

The judgement of the Court of Appeals was entered June 3, 1982. The jurisdiction of the Court is invoked under 28 USC 1254(1).

## STATUTES INVOLVED
### 33 USC 902(3)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any vessel under eighteen tons net.

## STATEMENT OF THE CASE

This case arises out of a claim for benefits under the Longshoremans' and Harbor Workers' Compensation Act, 33 USC 901 et. seq.

John F. Kelly had been a security guard at the waterfront for about one and one-half years, working for different employers. The accident herein occurred on the second day of claimant's employment with Marine Terminals Corporation. On the first day, Mr. Kelly, as a security guard, was charged with working the main gate. His duties involved standing guard at the gate, recording trucks coming in and going out so as to ensure that the containers that entered were the same containers that were taken out. He never checked the cargo proper; another employee, the clerk, specifically checked the contents of the trucks and containers coming in and leaving the premises. When the clerk left, no trucks were allowed in and Mr. Kelly's job was merely to secure the main gate and make sure no one entered.

On the second night of employment at Marine Terminals, the night of the accident, Mr. Kelly's assignment was that of a "rover". As a rover, Mr. Kelly was required to make hourly inspections of the terminal. He was provided with a map which identified 11 key stations. At each key station, he was to check in hourly so that there was proof that he was doing his job. He was provided with a jeep for transportation around the terminal.

Mr. Kelly was not required to move any of the containers in the yard or check their contents. The functional nature of Mr. Kelly's employment activities at Marine Terminals involved simply ensuring that no unauthorized persons were on the employer's premises and that all gates were secured.

His injury was incurred when he struck his foot against a concrete box housing electrical outlets for refrigerated containers, which resulted in his striking his head against a nearby pole.

The employer and insurance carrier disputed Mr. Kelly's claim for benefits as one not within the coverage of the Longshoremans' and Harbor Workers' Compensation Act (hereinafter the Act).

The claim was accordingly referred to an Administrative Law Judge for hearing. In his Decision and Order filed September 28, 1979, the Administrative Law Judge ruled that Mr. Kelly was covered by the Act at the time of his injury and awarded Mr. Kelly permanent total disability indemnity benefits.

In making this award against petitioners, the Administrative Law Judge rejected the contention advanced by petitioners that Mr. Kelly's employment as a security guard is not within the meaning of 33 USC 902(3) to entitle him to compensation under the Act. The Administrative

Law Judge rationalized that since cargo containers are clearly an integral part of loading and unloading operations, the security of the containers is also part and parcel of the loading and unloading operations, giving those employees employed as security guards for this purpose the necessary maritime status for coverage under the Act.

Upon the employer's and insurer's Petition for Review, the Benefits Review Board issued a Decision and Order filed June 19, 1981, reversing the decision of the Administrative Law Judge. In that decision the Board concluded that the claimant, John Kelly, employed as a security guard, lacked the realistically significant relationship to navigation and commerce which would bring him within the more general category of maritime employment and, thus, outside the scope of 33 USC 902(3). The Board's Decision conforms with its impression of the status and situs requirements announced by this court in the case of *P.C. Pfeiffer Company, Inc. v. Diverson Ford,* 44 U.S. 69, 11 BRBS 320 (1979).

The Ninth Circuit of Appeals, in an Order filed June 3, 1982, reversed the decision of the Benefits Review Board. The Court of Appeals found the facts of this case indistinguishable from those in *Arbeeny v. McRoberts Protective Agency,* 642 F.2d 672 (2d Cir. 1981). In *Arbeeny,* the 2nd Circuit held that claimants were covered under the Act because in protecting cargo from theft they were an integral part of the loading and unloading process.

## REASONS FOR GRANTING THE WRIT

This court, in *P.C. Pfeiffer Company, Inc. v. Diverson Ford, supra,* set out the substantive requirement of both status and situs as joint conditions of coverage and entitlement to benefits under the Act.

It is respectfully submitted that the Decision of the Ninth Circuit Court of Appeals, herein, fails to follow the requirements of the Supreme Court decision in *Pfeiffer* in that it virtually eliminates the status requirement and as such cannot be reconciled with the prevailing interpretation of the Act as announced by this honorable court.

## CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted and the judgement of the Court of Appeals reversed.

Respectfully submitted,

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August 2, 1982